MOTION FILED
MAY 2 4 1993

No. 92-1725

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

LEONARD L. GUMPORT, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines, Cross-Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. AS AMICI CURIAE IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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## MOTION OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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National Small Shipments Traffic Conference, Inc. and Health and Personal Care Distribution Conference, Inc. ("Shipper Conferences") are nonprofit membership corporations with more than 500 shipper members, including individuals, small companies and major corporations. The Shipper Conferences have for many decades actively represented their members' interests as shippers of freight before the Interstate Commerce Commission and in the federal courts. As customers of the trucking industry, the Conferences' members are besieged by undercharge actions aggressively framed by trustees of bankrupt motor carriers.

The Shipper Conferences previously filed a brief as *amici curiae* supporting the ICC's petition for writ of certiorari in the companion case to this case, No. 92-1547, *Interstate Commerce Commission v. Transcon Lines*. That brief was filed April 22,

1993 with the written consent of the ICC and United States and of Leonard L. Gumport, Trustee for Transcon Lines. The ICC and United States have also provided written consent to the Shipper Conferences' brief in this case. Transcon, Cross-Petitioner in this case, has refused consent this time, expressing displeasure with these Shipper Conferences' prior brief on the ICC credit rules issue.

That brief, and this one, should come as no surprise to Transcon, which consented to participation by the Shipper Conferences as *amici curiae* in the case below. These Conferences took similar positions before the Ninth Circuit, and the undersigned not only participated in the oral argument alongside counsel for the ICC, but addressed the precise issue Transcon seeks to raise before this Court, *viz.*, the issue of whether carriers are bound by tariffs they file using customer account codes to identify shippers.

Even prior to the litigation below, the Shipper Conferences had demonstrated an interest in these issues. The Conferences participated actively in proceedings before the ICC leading to several of the decisions discussed in the Cross-Petition, including *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984), and *Petition for a Declaratory Order — Discounts and Customer Account Codes*, 8 I.C.C. 2d 47 (1991), which are discussed in detail. The Conferences also filed briefs *amici curiae* in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) and *Reiter v. Cooper*, ___U.S.___, 113 S.Ct. 1213 (1993).

Many shipper members of the Conferences have been named as defendants in numerous undercharge cases asserting the same theory of recovery as to which review is sought in the Cross-Petition in this case. The interest of the Shipper Conferences in this case is undeniable.

The Shipper Conferences bring to this case a wealth of experience as participants in relevant ICC proceedings and court

cases, including the case below. They also represent hundreds of shippers who make use, on a daily basis, of carrier tariffs like those Transcon seeks to repudiate, and have paid computer-coded tariff rates to hundreds of motor carriers, both solvent and bankrupt, for many years. The Shipper Conferences are therefore able to discuss the practical implications, of which the ICC has no direct experience, of the industry's adoption of computerized customer account coded tariffs, which have become quite common since the ICC's 1986 decision granting carrier requests to use customer account codes. Regardless of what the Commission may ultimately decide about issues of lawfulness, shippers *must* be able to rely on the legality of the tariff rates under which they choose to ship their freight.

Transcon's Cross-Petition meets *none* of the accepted tests for review by this Court. Its attempt to create a new exception to the filed rate doctrine based on a carrier's assault on the legality of its own filed tariff rates, which was rejected in the decision below, finds no support in decisions of this Court or any court of appeals, and is contrary to the express provisions of the Interstate Commerce Act. See 49 U.S.C. § 11916. However, the pendency of Transcon's Cross-Petition is being used as a basis for continued pursuit of this specious legal theory, to the direct injury of the Shipper Conferences' members.

For the foregoing reasons, the Shipper Conferences should be given leave to file the accompanying brief.

Respectfully submitted,

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## I. INTEREST OF AMICI

National Small Shipments Traffic Conference, Inc. and Health and Personal Care Distribution Conference, Inc. ("Shipper Conferences") hereby submit their brief as *amici curiae* in opposition to the cross-petition for writ of certiorari filed by Leonard L. Gumport, Trustee of Transcon Lines ("Transcon"). Because Transcon refused to consent to the filing of this brief, the interest of these Shipper Conferences has been set forth in their Motion for Leave to File, *supra*.

## II. STATEMENT

Prior to Transcon's inventive argument to the District Court in this case, the undercharge campaign, aggressive though it was, had been confined to claims for tariff rates where the rates originally billed and paid had not been filed with the Interstate Commerce Commission. Transcon's determination to extract additional payments from *all* of its former shippers has produced a new legal theory, by which Transcon claims the right to repudiate its own published tariffs.

Wrapping itself in the flag of discrimination (which the Act prohibits to protect *shippers*), Transcon now claims that (1) the filed discount tariffs that enabled it to attract shipper business violated the Interstate Commerce Act; (2) the ICC decisions authorizing those tariffs were wrong; and (3) its former shippers must therefore pay much higher rates, years after the fact. In other words, having entered a "guilty" plea Transcon now demands, as its proper reward, collection of millions of dollars. The Ninth Circuit was repelled by this argument, and rightly so.

What makes the Trustee's assault on the customer account coded rates so totally without merit is that Transcon's shippers had every right to rely upon those rates. Prior to publishing such rates, Transcon went before the Commission and obtained specific approval for their publication. Subsequently, in a decision issued in 1986, the Commission generally approved customer account codes for publication in tariffs by all carriers. And, in 1991, the Commission issued yet another decision reaffirming the use of these account codes.

Even in today's largely deregulated environment, these Conferences' shipper members expect to be able to rely on carrier tariffs, and on the authority of the ICC's decisions and regulations. Transcon rejects all of these, repudiating both its own discount tariffs *and* ICC decisions approving those tariffs.

Though veterans of the undercharge wars, these Shipper Conferences have never before encountered anything to match the scorched earth policy adopted by Transcon. Recognizing no barriers to its goal of attacking *all* its former shippers, Transcon has now filed a legally frivolous Cross-Petition. This Court should reject Transcon's attack on its filed tariffs now.

### A. The Motor Carrier Act of 1980 Has Produced the Competitive Rates Congress Intended

Basic to Transcon's argument is its contention that, notwithstanding the Motor Carrier Act of 1980, motor carriers are required to maintain a single set of rates applicable to all shippers. In other words, it argues not only that computer-coded rate items but also all rate items which name the shipper, are both illegal and unlawful. Ultimately, Transcon is attacking the decision by Congress to promote competitively set, market-based motor carrier rates.

A number of the changes produced by the Motor Carrier Act of 1980 were noted by the Court in *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). The Court there recognized that the Motor Carrier Act "substantially deregulated the motor carrier industry in many ways in an effort to 'promote competitive and efficient transportation services.'" *Id.*, at 133, quoting 49 U.S.C. § 10101(a)(7). Pervasive competition quickly replaced pervasive regulation in the motor carrier industry, and freight rates quickly came to be set by market forces rather than by economic regulation, as Congress intended. Basically, the competition in the motor carrier industry is for the shipments of individual shipper customers, and carriers compete for each shipper's traffic on price, matching or bettering one another's discount rates as appropriate to the traffic of individual shippers.

Transcon's argument — that carriers are limited by statute only to publish rates applicable to all shippers — would eliminate competition for individual accounts. The result would be the lockstep rates that Congress intended to eliminate through

the 1980 Act. And a shipper which tenders hundreds of shipments to a carrier daily would be charged the same rate as a shipper tendering one shipment a year.

The uniform "class rates" collectively set by the carriers in motor carrier rate bureaus which were the norm prior to 1980 continue to exist today on paper. Those rates move little or no traffic, as they are both inflated and noncompetitive.[1] The class rates that are on file today exist as base rates for the publication of tariffs containing discounted rates set by competition for individual shippers.

Recently, the Commission conducted an exhaustive examination of motor carrier ratemaking in the post-1980 regulatory environment in *Investigation into Motor Carrier Collective Ratemaking and Related Practices*, 7 I.C.C. 2d 388 (1991), 1991 WL 106811 (I.C.C.). The Commission found that class rates now operate somewhat like inflated versions of automobile list prices. The Commission regards discounting from the collectively set class rates to produce individually set carrier-to-shipper rates as a development that advances the Congressional intent (*id.* at 411), and noted "[T]here have been no cases filed alleging unreasonable discrimination as a result of discounting practices." *Id.* at 428, n. 146.

If, as Transcon asks, this Court were to nullify or invalidate all tariff rates published under the names of individual shippers or under their account code numbers, that would eliminate all the normal competitively made rates in the tariffs and leave only the noncompetitive collectively-set class rates. Simply stated, Transcon is attacking the entire set of filed tariff rates which have been developed by Transcon and the other carriers to implement the competitive pricing objectives of the 1980 Act.

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[1] The whole point of Transcon's repudiation of its filed discount tariffs is to substitute much higher collectively-set class rates for the competitive rates at which shippers made their decision to use Transcon's services.

## B. Customer Account Codes in Carrier Tariffs

The Commission has approved the motor carrier industry's move toward individual pricing since 1980. In *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984), the ICC rescinded its regulation prohibiting tariffs containing rates for the account of a named shipper. In its Cross-Petition at 12, Transcon attacks this decision, arguing that it "veered sharply from this established precedent," by which Transcon means a series of railroad decisions predating even the *original* Motor Carrier Act of 1935. Transcon completely ignores the purpose of the Motor Carrier Act of 1980, on which the Commission relied in approving individualized tariff rates resulting from competition for shippers' business.

The statute does not prohibit rates for named shippers, stating only "A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs." 49 U.S.C. § 10762(a)(1). The Commission did not condone unlawful discrimination in *Rates for a Named Shipper*. It simply held that unreasonable discrimination cannot be presumed from the face of the tariff, but must be shown in an appropriate evidentiary proceeding under well established procedures. 367 I.C.C. at 963. And *none* of more than 100 parties to the proceeding challenged the Commission's conclusion that retention of its "outmoded and incorrect regulation would have a chilling effect on tariff simplification and stifle legitimate competition, contrary to the goals established for motor carriers of property by the Motor Carrier Act of 1980." 367 I.C.C. at 964.

The Commission subsequently received requests from carriers with computerized rate capability for authorization to replace shipper names in their discount tariffs with computer-compatible shipper account codes. The carriers elected to use a

number in each specific tariff item which was cross-referenced to their computerized billing system. As represented to the Commission by the carriers (including Transcon), approval of such codes was necessary to facilitate accuracy in making tariff changes, rating shipments, and issuing correct freight bills in an environment in which fast responses to competitors could make the difference between success and failure.[2] Indeed, minimizing undercharge claims to correct the original freight bills was offered as a reason for using customer account codes.

After granting many such applications by individual motor carriers, the Commission issued a blanket order authorizing customer account codes by all carriers in 1986. Again, in 1991, the Commission considered coded discount tariffs and approved them, citing essentially the same grounds on which it had previously approved rates for named shippers. *Regular Common Carrier Conference — Petition for Declaratory Order — Range of Discounts and Customer Account Codes*, 8 I.C.C. 2d 47 (1991) (1991 WL 179376 (I.C.C.)).

The Commission observed that "there is nothing in law or policy that establishes a wholesale prohibition from publication of tariffs that do not include direct shipper identifications," *id.* at 53. The Commission also rejected suggestions that customer account codes, by themselves, make tariffs fall short of applicable requirements, explaining (*id.* at 54):

> If a tariff lacks any of the essential information concerning the commodities, service points, and rate information, it is not the use of a customer code that would invalidate the tariff. Conversely, mere use of shipper codes does not mean necessarily that the tariff lacks any necessary information.

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[2] A copy of the ICC's February 5, 1986 decision approving Transcon's application for authority to use customer account codes in its tariffs is attached hereto as an Appendix.

As with *Rates for a Named Shipper*, the Commission merely permitted the use of customer account coded tariffs. Again, no party sought judicial review of the Commission's decision.

Today, it is estimated that *more than half of the freight transported by motor common carriers in the United States moves at discount rates in customer coded tariffs.* Although Transcon would have this Court believe that all such tariffs are "secret," *i.e.*, that only the carrier and the shipper know what that shipper's discount is, the reality is different. Many tariffs use alphabetically coded rates based on the shipper's name or address that are readily decipherable. There are also numerically coded discount tariffs which are successors, item by item, to earlier tariffs in the same series containing the shipper's name or address, permitting anyone who searches the tariff history to discover the discounts for individual shippers. And, typically, all the account-coded tariff items specify the commodity, the origin, the destination and the rate or discount. This is all that another shipper needs to seek similar treatment on the same commodity between the same points. But there is not now, nor was there ever, a statutory requirement to identify the shipper in a tariff rate item.

No shipper has ever challenged the use of customer account coded discount tariffs by Transcon (or any other carrier) as unreasonably discriminatory. The need for regulatory action has been displaced by the competitive option of arranging for publication of a comparable (or better) discount rate by another carrier.

In any event, if there were some defect in a carrier's use of an account code in a tariff rate item, it would not follow that the remedy for such a "violation" would be to erase the entire rate item bodily from the tariff, as Transcon seeks to do with hundreds of discount rate items. All that would be needed would be to remedy the "defect" of the account code itself. As Judge

Norris noted in his concurrence to the latest version of the Ninth Circuit's Opinion (1992 WL 465600, at p. 5):

> We would as soon invalidate only the coded restriction on who receives the discount rate, which would leave the Trustee vulnerable to shippers seeking overcharges for discounts denied because their customer numbers were not on the filed tariff. Either way, Transcon's rate filing must be reformed if the coded discounts are invalidated. But it is the Commission that has sole discretion to craft an appropriate remedy when the rates on file do not themselves comport with the law.

As the Commission took care to explain in the decisions cited above, there are well established procedures for challenging discrimination.[3] Where the requisite showing is made, the remedy is to correct the defect, not to nullify the tariff. See *Texas & P. Ry. Co. v. United States*, 289 U.S. 627, 650 (1933) and *Nueces County Navigation District No. 1 v. Abilene & S. Ry. Co.*, 364 I.C.C. 269, 276 (1980). The shippers who shipped via Transcon were entirely justified in relying on the legality and the lawfulness of the rates in Transcon's discount tariff.

### C. Discount Tariffs And The Undercharge Epidemic

In view of the foregoing it should be apparent that the argument in terms of discrimination among its former shippers is merely a pretext for Transcon's unilateral repudiation of its filed discount tariffs. The real target is the discounts themselves. The motor carrier industry's practice of marketing its services

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[3] *See Lawfulness of Volume Discount Rates by Motor Common Carriers of Property*, 365 I.C.C. 711, 716 (1982): "According to well-established precedent, unreasonable discrimination under 49 U.S.C. § 10741 requires that a complaining party show disparity of rates, competitive injury and common control by the carrier over the rates charged to both the preferred and the prejudiced shipper. If the shipper demonstrates these elements, the burden then shifts to the carrier to demonstrate that the difference is justified by differing transportation conditions."

based on a system of published tariff discounts from separately published undiscounted class rates has now led Transcon to this new type of undercharge campaign.

The disparity between the discounted and undiscounted rates is so great that no regular shipper would have shipped at the undiscounted rates, given the availability of discounts in other carriers' tariffs, and no carrier could survive by charging undiscounted rates. It is only bankrupt carriers, not constrained by market forces or concern for customer goodwill, which seek to apply the undiscounted rates retroactively.

Bankrupt carriers have proved to be highly inventive in finding ways to challenge the competitive rates that attracted shippers' business prior to their bankruptcies. But it is time to ring down the curtain on challenges to coded discount *tariff* rates. Because Transcon's legal position is utterly without merit, its Cross-Petition for writ of certiorari should be denied. If the writ is not denied, the Ninth Circuit's decision with respect to coded rates should be summarily affirmed.

## III. REASONS FOR DENYING THE WRIT

### A. Transcon Has Misread the Decision Below, Misread *Maislin* and Misread The Act

Transcon believes it has found a loophole in the filed rate doctrine whereby filed discount rates can be jettisoned on a wholesale basis. It is wrong. Though Transcon labors mightily to show that there is something improper about customer account codes, it has not cited a single case for the proposition that a carrier may repudiate a tariff even if it were undisputed that the tariff violates the Interstate Commerce Act. Here, of course, Transcon's claim of invalidity is not only disputed but the very tariff items it challenges were approved by the Commission before and after publication.

With the law so clearly against it, Transcon has been reduced to arguing that this Court should review the decision

below because it is internally inconsistent. Transcon's analysis is based on the following paragraph from the decision below (see ICC Petition in No. 92-1547, Appendix A at 22a):

> In the jargon surrounding the Act, a "legal" rate is the *filed* rate. *See Maislin*, 110 S.Ct. at 2767 ("the filed rate is the *legal* rate"). But a rate is not immune from challenge simply because it is filed; that rate must also comport with the other provisions of the Act. Any challenge to a filed rate is a challenge to its "lawfulness." *See Maislin, id.; Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 384 (1932); *Chicago, M., St. P. & R. Co. v. Alouette Peat Products*, 253 F.2d 449, 455 n. 5 (9th Cir. 1957); *Southern Pacific Transp. Co. v. San Antonio, Tex.*, 748 F.2d 266, 273-74 (5th Cir. 1984). In the technical language of the Act, an attack on the "legality" of a rate means an allegation that the rate is not a *filed* rate. As *Maislin* proves, a carrier has standing to challenge the legality of its own rates.

Seizing on the last sentence, Transcon rationalizes that (1) the Ninth Circuit recognized that a carrier has standing to challenge the legality of its own rates, though not their lawfulness; (2) so Transcon asserts that its coded rates are illegal (*i.e.*, not "duly" filed) as well as unlawful (*i.e.*, discriminatory); (3) therefore the Ninth Circuit erred in rejecting Transcon's challenge to its own rates on standing grounds. Cross-Petition at 8-9.

Transcon's analysis is disingenuous. As the first sentence of the quoted paragraph plainly states, the filed rate *is* the legal rate. Here, there is no dispute as to the fact that the customer account rates were all filed. Indeed, Transcon notes in its Cross Petition that over 98 percent of the rate items in its discount Tariff 625, on file with the Commission, were customer-coded. As the Ninth Circuit explains, "Any challenge to a filed rate is

a challenge to its 'lawfulness'.... an attack on the 'legality' of a rate means an allegation that the rate is not a *filed* rate." As this analysis establishes, what *Maislin* (and the Ninth Circuit) recognized is the standing of a carrier to challenge the legality of its own *unfiled* rates. Since Transcon's coded discount rates were filed with the ICC in Transcon's published tariffs, there can be no challenge to their legality.

Indeed, the enormity of the burden that Transcon would place upon shippers using filed tariffs would stand the Act on its head. Before a shipper could use a rate, it would not only have to ascertain that the rate is published in the tariff but somehow judge the legality of every note, number and symbol in the tariff. For, if any word, phrase or number in the tariff were "illegal", Transcon's argument would render the use of the rate itself illegal. And even express ICC approval of the form of tariff would not be enough.

Transcon would have shippers second-guess the carrier, the tariff and the Commission, and refuse to pay tariff rates that might subsequently be challenged. It is not clear how this absurd scenario would have helped Transcon. Since its discount rates were in a coded tariff, prescient shippers would not have used Transcon at all, hastening its demise.

The Ninth Circuit correctly read *Maislin*. This Court there observed that "The Act also specifically prohibits a carrier from providing services at any rate other than the filed (also known as tariff) rate.... Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the carrier or shipper. See §§ 11902-11904." 497 U.S. at 119.

The Interstate Commerce Act itself rejects the notion that a rate on file is not the "legal" rate. As provided in 49 U.S.C. § 11916 (emphasis added):

> Where a carrier files with the Interstate Commerce Commission or publishes a particular rate under chap-

> ter 107 of this title or participates in one of those rates, *the published or filed rate is conclusive proof against that carrier, its officers, and agents that it is the legal rate for that transportation or service* in a proceeding begun under section 11902 or 11903 of this title. A departure, or offer to depart, from that rate is a violation of those sections.

Transcon's attempt to evade the requirement that it observe its tariffs "until changed under law" (49 U.S.C. § 11903(b)) by creating a new exception to the filed rate doctrine is frivolous.

### B. Transcon's Disagreement With The ICC's Interpretation Of The Motor Carrier Act Of 1980 Does Not Permit It To Ignore Its Own Filed Tariffs

Transcon devotes the bulk of its Cross-Petition to feigned expressions of outrage over the threat of discrimination against its former shippers caused by its own actions. What Transcon proposes as a cure is to inflict serious injury upon every one of its customers, raising all of their rates to the highest levels Transcon can find, in order to "protect" them against a discrimination which none of them is claiming. Ignored in that recitation is the far greater threat to shippers posed by Transcon's "remedy." Shippers who relied on the legality of discount tariffs filed with the ICC, in a form expressly approved by the Commission, would have three years' worth of their freight bills doubled by Transcon, but for the decision below. The Ninth Circuit thus prevented what might have been the most expensive bait and switch operation in American history.

Transcon admits that "the Trustee's challenge to the discount rates as *per se* discriminatory was a challenge to the rates' lawfulness." Cross-Petition at 14. In arguing that its challenge was nevertheless sound, Transcon is forced by the absence of directly supporting precedent to rely on a number of false analogies. Thus at pp. 10-11 it relies on railroad cases from a

period of pervasive regulation and equalized rates (*viz.*, the turn of the century).[4]

At pp. 15-16 Transcon cites Justice (then Judge) Scalia's opinion in *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986), condemning, on judicial review of an ICC decision, tariffs that did not contain *rates*, in clear violation of Section 10762. And at page 18 it seeks to invoke analyses applied by the ICC to the propriety of carriers' rates and practices.

These "discrimination" citations are unavailing, for two reasons. First, carriers (and their trustees in bankruptcy) are not the ICC, and are not U.S. courts of appeals. They are not empowered to reverse Commission decisions, no matter how much they may disagree with them. Here, Transcon could have sought judicial review of the ICC's decisions permitting the use of customer account codes. Alternatively, it could have declined to use such codes, or could have published an index of shippers or taken other steps to avoid any "secrecy". However, having filed tariffs containing coded rates, it cannot now retroactively overrule the ICC decisions which granted it specific authority for its actions.

Second, even if the ICC had gone too far in permitting customer account codes (which these Shipper Conferences vigorously deny), no court may "correct" the "error" by in-

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[4] But see *Magnolia Provision Co. v. Beaumont, S. L. & W. Ry. Co.*, 20 F.2d 384 (S.D. Tex. 1927), *aff'd.* 26 F.2d 72 (5th Cir.), *cert. denied* 278 U.S. 620 (1928):

> It would be intolerable if a carrier could file with the Commission and cause to be published a rate, and then avoid its effects as to a specific shipment by claiming either that it violated the long and short haul [discrimination] provision of the law, or that it had failed in some technical requirement, such as noting the fact of an increase or decrease.

20 F.2d at 385.

validating entire filed tariffs.[5] *A fortiori*, this remedy is not available to Transcon on a self-help basis. As expressed in *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982):

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as nonexistent merely because of some element of substantive unlawfulness in the rate. *Davis v. Portland Seed Co.*, 264 U.S. 403, 44 S.Ct. 380, 68 L.Ed. 762 (1924), or some irregularity in the tariff filing formalities, *Berwind-White Coal Mining Co. v. Chicago & E.R.*, 235 U.S. 371, 35 S.Ct. 131, 59 L.Ed. 275 (1914). The principle in these cases is that where the shipper has been charged no more than the rate reflected in the tariff on file, the remedy for any unlawfulness or irregularity is measured not by looking to some other tariff but by the harm, if any, caused by the unlawfulness or irregularity. Further, as Genstar concedes, the Commission has had a longstanding policy that even where a tariff is filed without strict compliance with the provisions for tariff filing, the Act does not compel a refund of all charges collected under the tariff. *See, e.g., Ralston Purina Co. v. Atlantic B.&C.R.* 174 I.C.C. 722 (1931); *Concrete Engineering Co. v. Baltimore & O.R.* 160 I.C.C. 675 (1930); *Southern Transportation Co. v. Norfolk & W. Ry.*, 147 I.C.C. 29 (1928); *Greene Cananea Copper Co. v. Chicago, R.I. & P. Ry.*, 88 I.C.C. 225 (1924). The Commission in these cases repeatedly rejected arguments that a

---

[5] As this Court explained in *Burlington Northern, Inc. v. United States*, 459 U.S. 131 (1982) (on which the Ninth Circuit relied in the decision below) while federal appellate courts may review ICC orders, that authority "extends to the orders alone, and not to the rates themselves," because "Congress channeled all rate decisions to the Commission in the first instance." 459 U.S. at 140-41.

filed tariff should be treated as nonexistent because it was inconsistent with a Commission limiting order, although the Commission has, where appropriate, awarded a recovery for any harm suffered by the shipper because of the violation.

The putative "harm" from hypothetical discrimination among shippers asserted anomolously by Transcon is not subject to any remedy within the power of the Ninth Circuit to provide. The court below was therefore clearly correct in rejecting Transcon's challenge to the lawfulness of its own rates for lack of standing.

## IV. CONCLUSION

For the reasons set forth herein and in the brief in opposition being filed by the ICC and the United States, this Court should deny Transcon's Cross-Petition for a writ of certiorari.

Respectfully submitted,

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Dated: May 24, 1993

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

SPECIAL TARIFF AUTHORITY NO. 86-470

APPLICATION NO. 131

CUSTOMER ACCOUNT NUMBER

DECIDED: February 5, 1986

Transcon Lines, Inc., has requested authority to publish a series of unique code numbers in its tariffs, each code number applying for a different customer. Applicant proposes to have these code numbers control the application of rates and provisions within the tariffs.

As justification, applicant submits that granting this request will facilitate computerization of its rating and billing process, thus enhancing accuracy, improving efficiency and reducing costs.

The Commission granted a similar request for like authority to Roadway Express, Inc., January 30, 1985, in Special Tariff Authority No. 84-9406, Customer Account Numbers. In view of that action by the Commission, we will grant the request.

It is ordered:

Authority is granted to depart from the terms of 49 CFR 1312.13(j) and 1312.14(a)(3).

By the Commission, Suspension/Special Permission Board, Members Llewellyn, Manning and Hall.

(SEAL)

James H. Bayne
Secretary

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# REPLY BRIEF

Supreme Court, U.S.
FILED
JUN 4 1993
OFFICE OF THE CLERK

No. 92-1725

In The

# Supreme Court of the United States

October Term, 1992

LEONARD L. GUMPORT, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines,

*Cross-Petitioner,*

v.

INTERSTATE COMMERCE COMMISSION,

*Cross-Respondent.*

**On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

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## INTRODUCTION

The ICC opposes the Trustee's cross-petition for a writ of certiorari on two grounds. The first – that the Trustee lacks standing to challenge the legality of Transcon's secret-coded discount rates – is an ill-constructed circular argument that merits no detailed reply.[1] The

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[1] The ICC argues that because Transcon "filed" its secret-coded discount tariffs, the Trustee "cannot now unilaterally disavow those tariffs." Br. in Opp. at 8. This begs the very question raised by the Trustee's cross-petition. The Trustee acknowledges that TCON 625, which lists Transcon's secret-coded discount rates, was physically delivered to the ICC. But the Interstate Commerce Act ("Act") demands more than that when it requires a carrier to "publish and file" its tariffs. 49 U.S.C. § 10762(a)(1). Only when a tariff is filed and published in accordance with the statutory mandate is it "duly" filed. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (*quoting Louisville & Nashville R.R. Co. v. Maxwell*, 297 U.S. 94, 97 (1915)) ("under the Interstate Commerce Act, the rate of the carrier *duly* filed is the only lawful charge") (emphasis added). Only then does it become a "filed rate" "binding on both the shipper and the carrier." *Reiter v. Cooper*, 113 S.Ct. 1213, 1221 (1993). As set forth in the cross-petition, secret-coded discount tariffs such as TCON 625 are not "duly" filed rates or, for that matter, filed rates at all, because they do not contain within their "four corners" sufficient information to permit carriers, shippers, the general public or, for that matter, the ICC to calculate the applicable tariff in any particular situation. *See* Cross-Pet. at 14, *et seq.* All that TCON 625 discloses is that a carrier may charge from a low of $X to a high of $Y to ship identical goods over identical routes between identical points. Such a tariff is no more valid than the rate averaging tariffs found illegal in *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986). Coded tariffs are simply statements that secret concessions are being made to unknown, and possibly fictitious, shippers. The decision of the court of appeals compels the Trustee to enforce such secret rebate deals in contravention of the most basic precepts of the Act.

ICC's second ground – that even if the Trustee has standing to challenge the use of the secret-coded discount rates, his challenge lacks merit, and the similar argument of *amici* – is dealt with below.

## I. THE TRUSTEE'S CHALLENGE TO SECRET-CODED DISCOUNT RATES IS NOT AN "IMPROPER COLLATERAL ATTACK" ON ICC DECISIONS

The ICC argues that the Trustee's challenge to the secret-coded discount rates is an "improper collateral attack" against its decision endorsing secret shipper account codes, which was not appealed under the Hobbs Act, 28 U.S.C. §§ 2342, 2344. Br. in Opp. at 16. The ICC made the same argument below, where it was ignored by the court of appeals, and in *State of Texas v. United States*, 749 F.2d 1144 (5th Cir.), *cert. denied*, 472 U.S. 1032 (1985) ("*Texas*"), where it was expressly rejected by the Fifth Circuit. As *Texas* makes clear, judicial review of the statutory authority for the enactment of an agency rule and the application of that rule in a given case is permitted – whether or not Hobbs Act review is sought.

*Texas* involved a challenge by the State of Texas to an ICC order requiring the State to approve a tariff for intrastate contract carriage. The State contended the tariff was ineffective because it omitted an essential contract term, namely, the rate to be charged. The ICC, however, had previously adopted a rule authorizing the omission of that information from tariffs, and the time had passed for judicial review of that rule under the Hobbs Act. Nonetheless, the court agreed with the State's contention that it was not barred from asserting a challenge to either

the ICC's statutory authority to adopt the rule or to the rule as applied. *Id.* at 1146; *see also Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) (allowing attack against FCC rules three years after promulgation).

The ICC argued in *Texas* that review of its tariff rule "as applied" must be limited to an examination of "whether 'the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance.' " *Id.* at 1146 (*quoting Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)). The court rejected that argument, noting that *Pacific Gas* applied only to review of a rule in subsequent *administrative* proceedings, and stated, "the cases suggest the opposite, *especially when the contention is that the rule lacks statutory authorization.*" *Id.* at 1146 (footnote omitted) (emphasis added).

In this case, the Trustee argues that Transcon's secret-coded discount rates are illegal because they violate the Act's publication requirement, and that ICC decisions endorsing secret shipper account codes directly conflict with the Act. Cross-Pet. at 16-17. *Texas* and *Functional Music* establish that the Trustee is not barred from making this challenge – even though Transcon had, but did not avail itself of, an opportunity for direct attack on the rule under the Hobbs Act. *See Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975) (party who filed objections in agency rule making proceeding but failed to seek judicial review permitted to attack substantive validity of rule when applied in subsequent proceedings).

## II. CONSIDERATION OF THE TRUSTEE'S CHALLENGE TO THE SECRET-CODED DISCOUNT RATES IS NOT "PREMATURE"

Opposing review by this Court, the ICC avers that the "significance" of the Trustee's challenge is "limited" by the ICC's "recent decision to reconsider whether to retain, modify, or eliminate its authorization for the filing of rates using shipper codes. . . . " Br. Opp. at 16. This allegation lacks merit. On May 25, 1993, less than 24 hours after the ICC filed its brief, the ICC acted on its decision to "reconsider" *by reaffirming its prior authorization of the use of secret codes.*[2] If any "limitation" on the significance of the Trustee's challenge existed as a result of the ICC's decision to reconsider its endorsement of secret account codes, which the Trustee denies, that limitation was lifted by the ICC itself when it reaffirmed that endorsement.

Moreover, the ICC's suggestion – for which it offers no legal authority – that consideration by this Court of the issues raised in the Trustee's cross-petition is "premature" pending Hobbs Act review of its recent reaffirmation of the propriety of secret codes is nonsensical. Br. Opp. at 17. As the ICC concedes, the use of secret account codes has been widespread in the trucking industry since *1986,* when the ICC first issued its blanket authorization.

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[2] The reported decision is not yet available. According to an ICC press release, the ICC "clarified" that the "use of undisclosed customer codes is acceptable" where the tariff adequately discloses the commodities and locations involved. We have reprinted the ICC's press release in relevant part in the appendix to this reply.

Br. Opp. at 3. As the ICC also concedes, it has reaffirmed that authorization once before, in 1991. *Id.* The ICC can neither insulate its prior endorsement of the use of secret account codes nor preclude this Court from considering the issues properly and timely raised in the Trustee's cross-petition through last minute, successive decisions to "reconsider," and then to reaffirm, that endorsement. This case is not premature.[3]

## III. THE *AMICI CURIAE* BRIEF OF THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. LACKS MERIT AND SHOULD NOT BE CONSIDERED

The National Small Shipments Traffic Conference, Inc. and Health and Personal Care Distribution Conference, Inc. – two lobbying groups for their shipper-members (the "Shipper Groups") – have filed a joint motion for leave to file a brief as *amici curiae* in opposition to the Trustee's cross-petition. While the Trustee agreed to the

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[3] It must be recalled that "Congress . . . requested the Commission to initiate a proceeding to consider" whether "allow[ing] carriers to publish tariff rates for shippers identified only through the means of unexplained account codes listed in the tariffs . . . complies with the rate disclosure requirements of the Interstate Commerce Act. . . ." *Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs*, Decision No. 40888 (filed January 5, 1993). That request was rebuffed when the ICC "reaffirmed" its policy of allowing secret coded tariffs. The matters that were of Congressional concern now are presented to the Court by the Trustee's cross-petition. Those important questions are ripe for review, and may never be resolved absent this Court's intervention.

Shipper Groups' request to file as *amici curiae* a brief in support of the ICC's petition for certiorari in the companion case of *Interstate Commerce Commission v. Transcon Lines*, No. 92-1547, he refused consent in this case. As he advised the Shipper Groups, he did so because their *amici* brief in the companion case contained numerous misstatements and irrelevant matter.[4] Their proposed brief here is similarly objectionable.

The Shipper Groups, for instance, assert that even if the ICC went "too far in permitting customer account codes" no court could correct the error by invalidating the tariff and that, *a fortiori*, this remedy is not available to the Trustee on a "self-help basis." *Amici* Br. at 13-14. That assertion is irrelevant and misstates the facts.

First, the assertion is irrelevant because it begs the question presented in this case, namely, whether the unfiled and unpublished secret-coded discount rates in TCON 625 are duly filed and published tariffs within the meaning of the Act or whether, as the Trustee contends, they are merely announcements that shippers listed there by indecipherable numerical codes have been granted secretly negotiated discounts from the filed bureau rates. *See* Cross-Pet. at 19. If, as the Trustee contends, the rates are not duly filed and published, there is no tariff to be "invalidated." Instead, the Trustee is required under

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[4] The Trustee also observed that the Shipper Groups were advancing only the private interests of their members, and that the Acting Solicitor General and the Department of Justice were more than capable of bringing all relevant matters to the attention of the Court. *See* Sup. Ct. R. 37.1.

*Maislin* to collect undercharges on the basis of the undiscounted bureau rates, which concededly are part of Transcon's filed rate.[5] For this reason, the Shipper Groups' reliance on *Genstar Chemical Ltd. v. ICC*, 665 F.2d 1304, 1308 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) ("*Genstar*") is misplaced. *Amici* Br. at 14.

*Genstar*, an overcharge action, involved a carrier's failure to comply with requirements governing a rate increase. The tariffs disclosed all the information needed to determine the rate charged the shipper and the amount necessary to refund to the shipper to remedy any actual harm. The court declined to void the increase and held that a filed tariff should not be rejected merely because of some element of substantive unlawfulness in the rate or some irregularity in the tariff filing formalities. *Id.* at 1308. *Genstar's* rule of substantial compliance is inapplicable where, as here, the defects render a purported tariff a nullity. TCON 625's coded discounts were simply announcements that shippers listed by indecipherable numerical codes had been granted discounts from the filed bureau rates. *The key to the numerical codes was neither*

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[5] Claiming that its members "relied on the legality" of the secret-coded discount rates, the Shipper Groups assert that the Trustee should not receive a windfall, i.e., Transcon's higher filed rate, from a decision that the secret-coded discount rates are not duly filed and published. *Amici* Br. at 12. The same claim was raised and rejected in *Maislin*, where this Court stated that a carrier is *required to collect the filed rate, and that "equities" are not relevant to the application of that requirement.* 497 U.S. at 126-127. *See also Louisville & Nashville R.R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 65 (1924) (carrier's conduct cannot estop or preclude it from enforcing payment of filed rate).

*filed with the ICC nor open to public inspection.*[6] This left shippers no way to determine whether the rates Transcon gave them were higher, lower or the same as the rates Transcon gave the shippers' competitors, or even whether the rate applied to them.[7] *See* Cross-Pet. at 17. Even the ICC is at a loss to decipher those tariffs. *See* Cross-Pet. at 17, fn. 15 (letter from ICC's Chief, Section of Rates and Informal Cases, explaining that ICC is unable to determine if discount applied to particular shipper). The

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[6] The record includes a declaration in which Transcon's former Manager of Rates explained: "Transcon's discount tariffs are secret rebate agreements. They are designed to hide rather than 'publish' freight rates." He disclosed that Transcon filed tariffs that deliberately coded shipper names and that Transcon kept a key to the codes in its office – but did not file that key with the ICC. He further swore that "the tariff on file with the Interstate Commerce Commission does *not* contain a cross-reference to customer names . . . and therefore no one who looks at the official tariff on file at the Commission could know who is getting [the] discounted rate." 1 SER at 18-19 (emphasis in original). That evidence is undisputed by the ICC.

[7] The ICC attempts to diminish the significance of this fact by arguing that the Act does not expressly require that shippers' names be published. Br. in Opp. at 13-14. That point begs the question whether the ICC's secret code policy is in direct conflict with the Act's filing, publication and anti-discrimination requirements. The ICC's own internal office of Compliance and Consumer Assistance answered that question in the affirmative. Cross-Pet. at 17. In fact, the Act presupposes that common carriers, unlike contract carriers, will *never* tie a rate to the identity of a shipper. *Compare* 49 U.S.C. § 10102(14) (definition of "motor common carrier") *with* 49 U.S.C. § 10102(15) (definition of "motor contract carrier").

Shipper Groups' reliance on *Genstar* is also misplaced because it is flatly inconsistent with the ICC's "four corners rule," which the ICC has used to prevent the collection of undercharges by invalidating tariffs for rate or filing irregularities far less serious than the failure to identify the identity of a shipper granted a discount rate. *See* Cross-Pet. at 17-18.

Second, the assertion misstates the facts. The Trustee has not "invalidated" the secret-coded rates on a "self-help basis." The Trustee made no attempt to pursue undercharge claims based on the illegality of the secret-coded rates until *after* the district court held that secret-coded rates violated the Act's publication requirement. For this reason, the Shipper Groups' puzzling, albeit self-evident, observation that the Trustee is neither the ICC nor a court of appeals and is "not empowered to reverse Commission decisions," *Amici* Br. at 13, is also irrelevant.

A further illustration of the Shipper Groups' misstatements is their incorrect assertion that the court of appeals was "repelled" by the Trustee's challenge to Transcon's secret-coded discount rates. *Amici* Br. at 2. The Shipper Groups have it backwards. In fact, the court of appeals "admit[ted] to being troubled by the ICC's policy of allowing codes alone to identify shippers," and explained that "[s]uch a practice leads to secrecy, and secrecy makes possible discrimination in rate-setting." Cross-Pet. at 5.

The purpose of an *amicus curiae* brief is to bring to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Sup. Ct. R. 37.1. In view of its inclusion of irrelevant matter

and misstatements of law and fact, the Shipper Groups' brief does not meet that standard.

## CONCLUSION

For the foregoing reasons, and those stated in the Trustee's cross-petition, the cross-petition for a writ of certiorari should be granted, the judgment should be summarily reversed, and the case remanded with instructions to the court of appeals to decide the merits of the Trustee's challenge to the legality of Transcon's secret-coded discount rates.

Respectfully submitted,

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## APPENDIX A

## ICC NEWS

**FOR RELEASE**
**WEDNESDAY, MAY 26, 1993**
**No. 93-149**

### ICC ANNOUNCES RESULTS OF MAY 25 VOTING CONFERENCE

Docket No. 40888, *Reconsideration of Special Tariff Authorities Authorizing the Publication of Customer Account Codes in Tariffs.* The Commission voted (4-1) to modify the outstanding authority permitting customer codes, so as to clarify that use of undisclosed customer codes is acceptable only where the tariff otherwise adequately discloses the traffic to which the rate will be applied, *i.e.*, specifies the commodities and/or locations involved. Staff were instructed to come up with sufficiently concrete guidelines as to how much specificity is required as to make the acceptance of such tariffs for filing administratively workable. The Commission also noted that objections to such tariffs could be overcome by simply filing in tariff form the names of shippers and their corresponding codes and voted to instruct carriers that use shipper codes to immediately furnish all shippers with written confirmation of their account codes.